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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER DALE ABLES, Defendant and Appellant.	C083283 (Super. Ct. No. 15F0289)

Defendant Christopher Dale Ables appeals from his conviction for nine sexual offenses committed against the young daughter of his girlfriend. He contends: (1) there is insufficient evidence of force or duress as to counts 11 (forcible lewd act against a child under the age of 14 – Pen. Code, § 288, subd. (b))[1] and 13 (genital penetration with a foreign object, a finger - § 289, subd. (a)); (2) the trial court abused its discretion in considering defendant's position of trust as an aggravating factor and imposing the

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[1] Undesignated statutory references are to the Penal Code.

middle term; and (3) the trial court imposed an unauthorized sentence by issuing a no-contact order.

We conclude there is substantial evidence of force or duress as to counts 11 and 13, the trial court did not abuse its discretion in imposing the middle term, and the no-contact order was properly issued under section 136.2. Accordingly, we affirm the judgment.

BACKGROUND

On January 18, 2015, the then 12-year-old victim,[2] was visiting a friend at the Shasta Regional Medical Center. She approached a staff member and said she needed help because she was hurting herself, cutting herself, and taking pills. The victim told the emergency room charge nurse her "stepfather had been touching her for three years." She reported it had happened on several occasions in each home they had lived in, Washington, Oregon, and California. She also said she was afraid to go back home and be around him. Law enforcement officers came to speak with the victim. Because she had made a gesture indicating she wanted to hurt herself, she was held at the hospital under Welfare and Institutions Code section 5150.

The victim's mother dated defendant from 2010 until 2014. They met in California in October 2010. At the time, mother was living in Arizona with her two daughters, the victim and her sister. In January 2011, defendant moved to Arizona, and would come to mother's home. He began living with her, and over the next few years, mother, her daughters, and defendant moved to a number of different locations. From February 2011 to November 2011, they lived in two houses in Klamath Falls, Oregon and defendant lived with them. They moved back to Arizona in November 2011 and defendant lived with them. After Arizona, they moved to Washington in December 2012

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[2] The victim was born in March 2002.

until May 2014 and defendant lived with them. From May 2014 to November 2014, they lived in Palo Cedro, California and defendant lived with them. They moved to Redding, California from November 2014 to February 2015 and defendant lived with them. In February 2015, they returned to Washington. During those years, they also took family vacations together, including in June 2011 to Weaverville, and multiple trips in 2011 and 2012 to Ruth Lake.

Defendant was 20 years older than the victim. He was 5 feet 10 inches tall and weighed between 180 and 190 pounds. When the victim was 12 years old, she was approximately 5 feet 2 inches tall and weighed about 105 pounds.

The victim reported defendant's sexual abuse occurring over the course of years and in every home she and defendant had lived in together. The first time was in Weaverville where he tried to have her touch his genitals. In Ruth's Lake, he forced her to orally copulate him.

Defendant touched the victim's genitals more than once when living in Oregon, in his bedroom and in hers. He had her masturbate him in Washington. He also removed her pants and orally copulated her when they lived in Washington. The victim told her cousin defendant had been touching her, but she eventually recanted this statement. At that time, mother noticed changes in the relationship between the victim and defendant. They appeared angry with each other, and the victim was defiant and distant.

In Palo Cedro, defendant regularly digitally penetrated the victim, sometimes in the living room, defendant's room, or her room. He also forced her to touch his penis and masturbate him. She was uncomfortable every time, but did not know how to say that. One time in Palo Cedro, when she was sleeping, defendant came in to her room, took her pants off, and orally copulated her. He digitally penetrated her so often in Palo Cedro she did not know how many times it occurred. Sometimes, when she was sleeping, she would wake up with her pants off and defendant in the room, digitally penetrating her. Sometimes when he digitally penetrated her, he would also put her hand on his penis and

move her hand to masturbate him. She never touched his penis voluntarily. On one occasion in Palo Cedro, defendant grabbed her clothing, pulled her clothes off, digitally penetrated her, orally copulated her, and held her against the bed and the tip of his penis penetrated her vagina. Sometimes she tried to leave and defendant would not let her leave. In Redding, defendant most often digitally penetrated her and had her masturbate him. He would put her hand in his pants and sometimes she would try to pull away or get away from him. On one occasion in Redding, defendant "unbuttoned and ripped" off her clothes and orally copulated her.

Initially, defendant denied any sexual touching of the victim. Later he claimed the victim initiated the sexual conduct. He admitted digitally penetrating the victim after she initiated contact. He denied he had ever orally copulated her, but admitted he had licked her vagina once in Palo Cedro. At trial, defendant continued to deny sexual conduct with the victim other than the acts he had previously admitted. He continued to claim the victim was the initiator and aggressor in their sexual contact. Defendant wrote an apology letter to the victim. While in custody, he also wrote letters to mother and her sister-in-law. These letters were consistent with his trial testimony and statements to law enforcement, he accepted some responsibility but cast the victim as the initiator and aggressor in the sexual conduct.

PROCEDURAL HISTORY

An information charged defendant with: oral copulation and digital penetration of a child 10 years of age or younger (§ 288.7, subd. (b) - count 1); eight counts of lewd or lascivious acts with a child under the age of 14 (§ 288, subd. (a) - counts 2, 7, 8, 9, 10, 12, 14, and 16); aggravated sexual assault of a child (§ 269, subd. (a)(1) - count 3); oral copulation of a child under the age of 14 (§ 288a, subd. (c)(1) - count 4), two counts of forcible lewd acts upon a child under the age of 14 (§ 288, subd. (b) - counts 5 and 11); sexual penetration with a foreign object on a child under the age of 14 (§ 289, subd. (j) - count 6); and two counts of forcible anal or genital penetration with a foreign object on a

child under the age of 14 (§ 289, subd. (a) - counts 13 and 15). As to counts 2 and 4 through 16, the information further alleged defendant engaged in substantial sexual conduct (§ 1203.066, subd. (a)(8)). The parties stipulated to a court trial.

After the parties rested, the trial court granted the People's motion to dismiss counts 15 and 16. The trial court also granted the request to apply the section 1203.066 finding to counts 7 through 14 only. The trial court found defendant guilty on counts 4, 6, 7, 8, 9, 11, 12, 13, and 14. As to counts 7, 8, 9, 11, 12, and 14, the trial court found the substantial sexual conduct allegation true. As to count 13, the court found the substantial sexual conduct allegation not true. The court found defendant not guilty on counts 1, 2, 3, 5, and 10.

The trial court denied probation and sentenced defendant to state prison to serve a term of 32 years as follows: six years, the midterm, on count 4; eight years, the midterm, on count 11; six years, the midterm, on count 13; and two years, one-third of the midterm, on each of counts 6, 7, 8, 9, 12, and 14. The trial court also issued a 10-year criminal protective order under section 136.2, prohibiting defendant from having any contact with the victim. The trial court granted defendant 714 days of presentence custody credits, and imposed required fees and fines.

I

Evidence of Force or Duress for Counts 11 and 13

Defendant contends there was insufficient evidence of force or duress as to counts 11 and 13, defendant making the victim masturbate him in Redding and defendant digitally penetrating the victim in Palo Cedro, respectively. Accordingly, he contends this court should reverse or reduce those convictions.

"When a defendant challenges the sufficiency of the evidence, ' "[t]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty

beyond a reasonable doubt." [Citation.]' [Citation.] 'Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence. [Citation.]' [Citation.] We ' " 'presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " [Citation.]' [Citation.]" (*People v. Clark* (2011) 52 Cal.4th 856, 942.) "[W]e do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Jones* (1990) 51 Cal.3d 294, 314.) "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

The offenses of forcible sexual penetration and forcible lewd acts on a child under the age of 14 years each require proof that "force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person" was used. (§§ 289, subds. (a)(1)(B), (j), 288, subd. (b)(1).) This is the only element of these offenses on which defendant claims there is insufficient evidence.

In this context, "force" means "physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself." (*People v. Cicero* (1984) 157 Cal.App.3d 465, 474.) Duress in this context, means "a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted." (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 (*Pitmon*); *People v. Wilkerson* (1992) 6 Cal.App.4th 1571, 1578–1579; *People v. Schulz* (1992) 2 Cal.App.4th 999, 1005.) Physical force may be present in situations of duress, but need not be. (*Pitmon*, at pp. 50–52; *People v. Cardenas* (1994) 21 Cal.App.4th 927, 939.) The very nature of duress involves psychological coercion, as "duress" would be redundant if its meaning were no different than "force," "violence," "menace," or "fear of immediate

and unlawful bodily injury." (*Pitmon,* at pp. 47–48, 51; *People v. Superior Court* (*Kneip*) (1990) 219 Cal.App.3d 235, 237; *People v. Senior* (1992) 3 Cal.App.4th 765, 775.) In determining the existence of duress, we consider the total circumstances, such as the defendant's position of dominance and authority with the victim, his or her continuous exploitations of the victim, the age of the victim, and the relative sizes of the parties. (*Senior, supra*, 3 Cal.App.4th at p. 775; *Cardenas*, at p. 940; *Schulz*, at p. 1005; *Pitmon*, at p. 51; *Cicero*, at p. 482.) When considering whether duress was present, we look to a reasonable young person in the victim's position. (See *People v. Bergschneider* (1989) 211 Cal.App.3d 144, 154.)

Although not all of the incidents described by the victim involved the use of force, the evidence here established duress. Defendant came into the victim's life as her mother's boyfriend when the victim was eight years old. The victim was nine years old when the sexual abuse started. It continued over years, until she was almost 13 years old. Defendant was 20 years older than the victim, at least eight inches taller, and over 70 pounds heavier. Defendant lived with the victim from 2011 to 2015, and he occupied a parental role in her life. The victim identified defendant as her stepfather. In every home they lived in together, he repeatedly sexually molested her by digital penetration, masturbation, oral copulation, and genital penetration. On more than one occasion he started molesting her while she slept. She would wake up after he had removed her clothing and was digitally penetrating her, sometimes continuing the molestation to include oral copulation and, once including genital penetration as he held her against the bed. Other times he ripped her clothing off and molested her. Sometimes she tried to leave and he would not let her. She was uncomfortable telling anyone what was happening and did not know what to say.

"[A]s a factual matter, when the victim is as young as this victim and is molested by her father in the family home, in all but the rarest cases duress will be present." (*People v. Cochran* (2002) 103 Cal.App.4th 8, 16, fn. 6, overruled on other grounds as

stated in *People v. Soto* (2011) 51 Cal.4th 229, 248, fn. 12.) This statement holds equally true when the molester is a resident parental figure, rather than a biological father. In light of all the circumstances present, the victim's young age, the significant size difference between defendant and the victim, defendant's position of parental authority over the victim, the ongoing and continuous abuse of the victim, including when she was resisting and when she was defenseless being awakened in the middle of the night disrobed, we conclude substantial evidence of duress supports the convictions in counts 11 and 12. (See *People v. Montero* (1986) 185 Cal.App.3d 415, 425–426; *Pitmon*, *supra*, 170 Cal.App.3d at p. 51; *Cochran,* at pp. 12–14; *People v. Sanchez* (1989) 208 Cal.App.3d 721, 747–748; *People v. Superior Court* (*Kneip*), *supra*, 219 Cal.App.3d at p. 239.)

II

Trial Court's Exercise of Sentencing Discretion

Defendant contends the trial court abused its discretion by making an improper finding as to one aggravating factor, failing to give proper weight to "strong mitigation in this case," and imposing midterm sentences. Defendant argues the trial court improperly found defendant took advantage of a position of trust. Relying on section 1203.066, he contends "the law cannot both punish and exonerate an adult who lives with a child victim."

The premise underlying defendant's claim is wrong. Section 1203.066 does not "exonerate an adult who lives with a child victim." Rather, the statute recognizes in some specific circumstances, granting a resident child molester probation may be "in the *best interest of the child victim*." (§ 1203.066, subd. (d)(1)(A), italics added.) Among the reasons it may be in the child victim's best interest for the molester to be granted probation rather than imprisoned is the guilt that young victims may feel, and financial and emotional dependence of loved ones on the molester resulting in blame and abandonment of the child victim. (*People v. Wutzke* (2002) 28 Cal.4th 923, 936-937.) In

addition, section 1203.066 does not guarantee or require leniency for a nonrelative household member. Rather, such defendants are only eligible for probation if all the required statutory findings are made; and even then the trial court " 'is not precluded from sentencing the defendant to jail or *prison*.' [Citation.]" (*Wutzke*, at p. 942.) "In any event, fixing the range of punishment for crime rests on policy determinations that the legislative branch is specially empowered to make. [Citation.] Lawmakers are entitled to sanction criminal conduct more or less severely based on the surrounding circumstances, including the dangerousness of the offender, the vulnerability of the victim, and the nature of the parties' relationship. [Citations.]" (*Ibid.*) Finally, by its express terms, defendant was not eligible for leniency under section 1203.066, as he was convicted of a forcible lewd act committed by duress. (§ 1203.066, subds. (a)(1), (a)(8).)

Under section 1170, subdivision (b), the choice of the appropriate term from three statutorily specified possible terms rests within the court's sound discretion. "In determining the appropriate term, the court may consider the record in the case, the probation officer's report, . . . and any further evidence introduced at the sentencing hearing. The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected and the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law." (§ 1170, subd. (b).) Although the court must state reasons for imposing the selected term, those reasons need not include facts deemed by the court to be aggravating or mitigating circumstances. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.)

The " ' "burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." ' " (*People v. Carmony* (2004) 33 Cal.4th 367, 376–377.) A "trial

court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at p. 377.)

Defendant has not met his burden. Here, the trial court reviewed the probation department's report and attachments, the People's statement in aggravation, a victim impact letter from the family, and multiple letters from family members and friends supporting defendant. The trial court also considered defendant's in-court statement at sentencing, and both trial counsels' arguments on sentencing. The trial court explicitly: rejected the probation department's conclusion the victim was unusually vulnerable; found offensive defendant's position that the victim initiated the sexual conduct; gave defendant credit for partially admitting his conduct, and being remorseful, although the trial court also noted defendant continued to minimize his conduct and blame the victim; and acknowledged defendant had a minimal criminal record. The trial court found the mitigating factors to be: defendant did "not have a significant criminal record and to some extent that-- the fact that you admitted some culpability in the offense. As far as the aggravating factors, you took advantage of a position of trust. You also had the opportunity to reflect on your conduct and to make it a one-incident situation, and instead you repeated that conduct." Accordingly, the trial court felt the midterm was appropriate.

The trial court appropriately found defendant violated a position of trust. Defendant lived with the victim's family for years. He occupied a parental role in her life and she considered him her stepfather. As such, he was "not merely a resident in the same house as [the victim], but was a person in whom she reposed trust and confidence." (*People v. Franklin* (1994) 25 Cal.App.4th 328, 338.) The trial court did not err in citing this as a factor in aggravation. The trial court properly exercised its discretion in identifying, considering, and weighing mitigating and aggravating circumstances. There was no abuse of discretion.

III

No-contact order

Defendant contends this court must strike the no-contact order made pursuant to section 1202.05. He contends this no-contact order is an unauthorized sentence, as section 1202.05 does not prohibit contact between abusers and their victims, but rather regulates visitation between victims and prison inmates. Thus, under that section, the trial court could not prohibit all forms of communication for 10 years, but could only order no visitation until the victim turned 18 years old. Defendant also contends the order could not have been issued under section 136.2, although he was potentially subject to an order under that section, because the trial court did not exercise its discretion under that statute and did not select a duration for the order based on the facts before it.

The record does not support defendant's contentions. In addition to the probation department's recommendation defendant be denied visitation with the victim under section 1202.05, the People explicitly sought a 10-year criminal protective order under section 136.2, subdivision (i)(1). The trial court indicated it would allow defense counsel to respond after some other sentencing issues were addressed . After the other sentencing matters were addressed, the trial court stated, "Okay. [¶] And now, the last thing we should discuss is the People's request that I execute the ten-year criminal protective order because I don't think you had the chance to speak to that. You don't have to; you can submit." Defense counsel answered, "I'll be submitting." The trial court then stated, "Then I think [the district attorney] has demonstrated and justified her comments why this should be signed. [¶] . . . I think it's appropriate to protect her and her interest. [¶] So I have executed that document . . . by the way, that protective order is under [s]ection 136.2."

Thus, this record demonstrates the trial court exercised its discretion to impose a no-contact order under section 136.2 and determined 10 years to be the appropriate term of the order.

DISPOSITION

The judgment is affirmed.

/s/
HOCH, J.

We concur:

/s/
HULL, Acting P. J.

/s/
ROBIE, J.